No. 94-1629

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In The

Supreme Court of the United States

October Term, 1994

DANIEL M. TABAS, JOSEPH P. CAMPBELL, JAMES J. McSWIGGAN, LEE A. TABAS, ROBERT TABAS, SUSAN TABAS TEPPER, LINDA TABAS STEMPEL, JOANNE TABAS WURZAK, CAROL TABAS STOFMAN and HOWARD WURZAK,

Petitioners,

vs.

HARRIETTE S. TABAS, RICHARD S. TABAS, NANCY C. TABAS and GERALD LEVINSON, as Executors of the Estate of Charles L. Tabas,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

This civil action was brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. No. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968 (1984 ed. & 1995 Supp.). Plaintiffs-respondents presented substantial evidence on summary judgment (including two comprehensive financial reports prepared by the national accounting firm Price Waterhouse) that defendants-petitioners committed a series of related predicate acts of mail fraud over a period of at least three and one-half years and that said unlawful activity was their regular way of doing business. The questions presented are:

1. Must plaintiffs-respondents additionally demonstrate a "threat of societal harm" separate and distinct from the threat that is *ipso facto* posed by such long-term criminal conduct, merely because the scheme at issue is one to defraud a decedent's estate and its numerous beneficiaries of millions of dollars?

2. Should this Court "amend" RICO by requiring proof of the existence of an independent "societal threat" beyond the commission of the criminal predicate acts over a substantial period of time, under circumstances where Congress has considered precisely such an amendment but has never enacted it?

3. Should this Court grant review of the constitutionality of the civil RICO statute under circumstances (i) where petitioners failed to raise the question in the district court, in the court of appeals in the first instance, or in the court of appeals on rehearing *in banc*, and (ii) where there is no claim of unconstitutionality of the underlying mail fraud statute?

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No. 94-1629

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

DANIEL M. TABAS, JOSEPH P. CAMPBELL, JAMES J. McSWIGGAN, LEE A. TABAS, ROBERT TABAS, SUSAN TABAS TEPPER, LINDA TABAS STEMPEL, JOANNE TABAS WURZAK, CAROL TABAS STOFMAN, and HOWARD WURZAK,

Petitioners,

v.

HARRIETTE S. TABAS, RICHARD S. TABAS, NANCY C. TABAS, and GERALD LEVINSON, as Executors of the Estate of Charles L. Tabas,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The respondents Harriette S. Tabas, Richard S. Tabas, Nancy C. Tabas, and Gerald Levinson, as Executors of the Estate of Charles L. Tabas, plaintiffs in the district court, respectfully pray that this Court deny the Petition for a Writ of

Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered on February 13, 1995.

OPINIONS BELOW

The *in banc* opinion of the United States Court of Appeals for the Third Circuit, dated February 13, 1995, is reported at *Tabas v. Tabas*, 47 F.3d 1280 (3d Cir. 1995). While petitioners reported that the Third Circuit's *in banc* opinion had been amended three times since February 13, 1995, *see* Petitioners' Appendix at 2a, petitioners included some, but not all, of the amendments in their reproduction of the opinion below. Petitioners did not include the first item from Judge Becker's February 23, 1995 amendment, but included the second through fourth items therein; petitioners included the first item from Judge Roth's March 1, 1995 amendment, but did not include the second through fifth items therein; and, petitioner did not include Judge Alito's March 7, 1995 amendment. In addition, Judge Becker's concurring opinion was amended again on May 2, 1995. For the Court's reference, respondents reproduce the amendments of February 23, 1995, March 1, 1995, March 7, 1995 and May 2, 1995, in Respondents' Appendix at 1b–8b.

STATEMENT OF JURISDICTION

Respondents agree that jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1) (1988). Respondents do not agree, however, that the petition for a writ of certiorari properly draws into question the constitutionality of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. No. 91–452,

Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961–1968 (1984 ed. & 1995 Supp.), inasmuch as petitioners did not challenge the constitutionality of the RICO statute in the district court, in the court of appeals in the first instance, or in the court of appeals on rehearing *in banc*.

STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners failed to set forth in their Appendix a pertinent portion of the federal mail fraud statute, *to wit*, 18 U.S.C. § 1946 (1988). That statute states:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1946 (1988).

STATEMENT OF THE CASE

This civil action was brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. No. 91–452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961–1968 (1984 ed. & 1995 Supp.), by respondents Harriette S. Tabas, Richard S. Tabas, Nancy C. Tabas, and Gerald Levinson, as Executors of the Estate of Charles L. Tabas, plaintiffs in the district court (hereinafter "plaintiffs" or "the Estate"). Plaintiffs brought their RICO action against petitioner Daniel M. Tabas (brother of the late Charles Tabas) and others (hereinafter "defendants"). The gravamen of plaintiffs' RICO complaint, filed on March 4, 1991 and amended on May 20, 1991, is that from November 21, 1987,

and continuing to May 20, 1991, and into the future, defendants conducted and continue to conduct the affairs of Tabas Enterprises (a fifty-fifty partnership that was created by Daniel Tabas and Charles Tabas to conduct real estate and other business ventures) through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c), proximately causing millions of dollars in injury to the Estate of Charles Tabas.[1] In opposition to defendants' motion for summary judgment, plaintiffs presented substantial evidence (including two comprehensive financial reports prepared by the national accounting firm Price Waterhouse) that defendants committed a series of related predicate acts of mail fraud over a period of three and one-half years and that said unlawful activity was their regular way of doing business.[2] The district court granted summary judgment on the basis that plaintiffs had not satisfied the continuity prong of RICO's pattern of racketeering requirement. The court of appeals in the first instance and the court of appeals upon rehearing *in banc* reversed.

For further detail regarding the Statement of the Case, plaintiffs hereby incorporate by reference the comprehensive statement of the case that was set forth by the United States Court of Appeals for the Third Circuit, sitting *in banc*. (App.

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[1]Plaintiffs also brought claims under 18 U.S.C. § 1962(a), (b) and (d). Plaintiffs' claims against defendants for damages caused from the time of Charles Tabas' death in 1983 through November 20, 1987 were settled between the parties, and are not the subject of plaintiffs' RICO action.

[2]Price Waterhouse conducted two examinations of the books and records of Tabas Enterprises; the first review was for the period November 20, 1987 through December 31, 1989 and the second review was for the period January 1, 1990 through June 30, 1991.

at 3a–16a.)[3] That statement, Part I of the court's opinion, was joined by a majority of the judges *in banc*. (Resp. App. at 8b, Becker, J., concurring; Resp. App. at 6b, Alito, J., concurring.)

In addition, in accordance with Supreme Court Rule 15.1, plaintiffs point out the following misstatements contained in defendants' Statement of the Case (Pet. at 2–6):[4]

(a) Defendants incorrectly state that following Charles Tabas' death in 1983, defendant Daniel Tabas and Charles Tabas' widow, plaintiff Harriette Tabas, "agreed to continue certain practices, that had been agreed to and participated in by Charles, regarding the use and distribution of partnership funds." (Pet. at 2.) Harriette Tabas did not *agree* to "continue certain practices." The arrangement was presented to Harriette Tabas on behalf of Daniel Tabas as a *fait accompli*. Further, the Third Circuit did not find an agreement by Harriette Tabas. (*See* App. at 4a, 5a n.3.)

(b) Defendants incorrectly state that "the court's decision renders continuity exclusively a durational concept[.]" (Pet. at 4.) The court, after finding "from the strictly durational aspect of the scheme, that plaintiffs in the present case have made a sufficient showing to survive summary judgment on the 'continuity' prong of the pattern analysis[,]" (App. at 33a), went on to consider "what more is required in order to evaluate whether continuity has been established when

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[3]References herein to the Petition for a Writ of Certiorari are to Pet. at __. References herein to Petitioners' Appendix are to App. at _a. References herein to Respondents' Appendix are to Resp. App. at _b.

[4]The Estate points out only those misstatements material to its RICO case against defendants.

predicate acts have occurred over a period of several years." (App. at 34a.) The court first stated that when "the predicate acts have been a regular way of conducting defendant's legitimate business over a long period in the past, the RICO pattern has been satisfied." (App. at 34a.) The court then found that "the allegations made by plaintiffs concerning defendants' manner of doing business over this period satisfy such a RICO continuity requirement." (App. at 34a.) That the court did not, in the words of the petition, render continuity "exclusively a durational concept[,]" (Pet. at 4), is underscored by petitioners' subsequent description of Circuit Judge Alito's concurring opinion: "Judge Alito also concurred in the result, although he declined to join the majority's analysis concerning pattern continuity *and continued to adhere to his analysis that continuity is exclusively a durational concept....*" (Pet. at 5.) (Emphasis added.) If the majority had, as petitioners suggested, rendered continuity "exclusively a durational concept[,]" (Pet. at 4), then Judge Alito would have had no reason to decline "to join the majority's analysis concerning pattern continuity *and continue[] to adhere to his analysis that continuity is exclusively a durational concept....*" (Pet. at 5.) (Emphasis added.)

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for several reasons. First, contrary to petitioners' suggestion, there is no "conflict" whatever between the Third Circuit's *in banc* decision in this case and this Court's decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). In fact, the Third Circuit specifically followed this Court's decision in *H.J. Inc.* with regard to its continuity analysis. In addition, the Third Circuit specifically followed this Court's decision in *H.J. Inc.*, as well as this Court's decisions in *National Organization*

for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994), and *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), when the Third Circuit declined to invent a rule that RICO's pattern of racketeering concept requires an independent allegation and proof of a "societal harm" separate and distinct from that which is posed by the commission of the predicate acts over a substantial period of time. (App. at 30a n.17, 38a.) Likewise, the "conflict" alleged by petitioners between the Third Circuit's *in banc* decision in this case and decisions from the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits is neither real nor irreconcilable. In fact, as even the dissent in the case *sub judice* noted, decisions from the First, Fourth, and Sixth Circuits are in accord with the majority's *in banc* opinion. (App. at 54a n.33, Greenberg, J., dissenting). The decisions from the other circuits cited by petitioners can be reconciled with the Third Circuit's decision in this case. *See infra* pp. 8–23.

Second, petitioners would have this Court "amend" RICO -- a task that this Court repeatedly has made crystal clear can be done only by Congress. *H.J. Inc.*, 492 U.S. at 249; *Sedima*, 473 U.S. at 499–500. Significantly, the very amendment sought by petitioners in this case (*i.e.*, the rejection of mail fraud as a predicate act in cases involving legitimate businesses absent proof of a "societal harm" beyond that posed by the commission of related predicate acts of mail fraud over a substantial period of time) was specifically considered *and not enacted* by Congress. *See infra* pp. 23–27.

Third, petitioners would have this Court review the constitutionality of a civil statute under circumstances where the constitutionality was not raised in the district court, in the court of appeals in the first instance, or in the court of appeals *in banc*, and where there has been no assertion that the statute governing the underlying predicate offense (*i.e.*, the federal

mail fraud statute) also is unconstitutional. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 58 (1989) ("We find no merit in petitioner's claim that the Indiana RICO law is unconstitutionally vague as applied to obscenity predicate offenses. Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either."). *See infra* pp. 27–29.

For the foregoing reasons, all of which are explained in greater detail below, the petition for a writ of certiorari should be denied.

ARGUMENT

1. The Third Circuit's *in banc* decision in this case does not conflict with this Court's decision in *H.J. Inc.* or with the decisions of the other Courts of Appeals, and the Third Circuit properly refused to require an independent allegation and proof of a "societal harm" separate and apart from that which is posed by the commission of the predicate acts over a substantial period of time.

(a) Defendants erroneously assert that the Third Circuit's *in banc* opinion on the issue of continuity conflicts with this Court's decision in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). (Pet. at 7.) The Third Circuit expressly followed this Court's decision in *H.J. Inc.* when it held that plaintiffs had presented evidence that defendants engaged in a pattern of racketeering activity, legally sufficient to survive summary judgment. (App. at 29a–38a.) In *H.J. Inc.*, this Court made clear that a plaintiff can satisfy the continuity requirement of RICO *either* by showing a series of related predicate acts extending over a substantial period of time (closed-ended continuity) *or* by showing that the

racketeering acts themselves threaten future repetition (open-ended continuity). 492 U.S. at 241-42. In other words, if a plaintiff cannot show that the related predicate acts of racketeering have been already ongoing for a substantial period of time, then the plaintiff must show that there is a threat that the related predicate acts of racketeering will continue into the future.

In this case, although not required to do so, plaintiffs demonstrated both closed-ended and open-ended continuity under *H.J. Inc.*, and the Third Circuit so found. (App. at 33a-35a.) Indeed, plaintiffs showed a series of related predicate acts (forty-one acts of mail fraud) extending over a period of three and one-half years. (App. at 33a.) The Third Circuit found that this showing, coupled with the "allegations made by plaintiffs concerning defendants' manner of doing business over this period[,] satisfy ... a RICO continuity requirement." (App. at 34a (citing *H.J. Inc.*).) The court of appeals then alternatively held that "even if we were not to have found that conduct lasting three and one-half years was sufficient to establish closed-ended continuity, we conclude that continuity still would have been established ... under an 'open-ended' continuity analysis." (App. at 35a (citing *H.J. Inc.*).) The fact that the Third Circuit considered something "more" beyond duration to determine "closed-ended continuity" (App. at 34a & n.20), and the fact that the Third Circuit reached and decided the question of "open-ended continuity" (App. at 35a-37a), flatly contradict the suggestion in defendants' first Question Presented that the Third Circuit rested its finding of continuity on duration alone.[5] Given the Third Circuit's

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[5]Plaintiffs argued in the court of appeals that proof that defendants committed related predicate acts of mail fraud over a substantial period of time, here more than three and one-half years, is, in

(continued...)

treatment of the continuity analysis, defendants' first Question Presented is hypothetical and should not be reviewed by this Court.

This Court should also decline to review defendants' first Question Presented since the Third Circuit specifically *followed* the teachings of this Court when it refused to invent a rule that RICO's pattern of racketeering concept requires an allegation and proof of a "societal harm" separate and distinct from that which is posed by the commission of related predicate acts over a substantial period of time. (App. at 30a n.17, 38a.) As the Third Circuit stated:

> We recognize that our ruling means that RICO, with its severe penalties, may be applicable to many "garden-variety" fraud cases, particularly considering the judiciary's broad interpretation of the mail fraud statute. We are bound, however, by the language of RICO itself and the Supreme Court's instruction that "RICO is to be read broadly." Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to narrow RICO's scope.

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[5](...continued)
itself, sufficient to satisfy the continuity prong of RICO's pattern requirement. Four of the judges of the court of appeals agreed. *See* App. at 42a-45a (Becker, J. concurring); 49a-50a (Alito, J., concurring). Contrary to the suggestion in defendants' first Question Presented, however, and as noted above, the court of appeals rested its finding of closed-ended continuity on plaintiffs' showing of both substantial duration *and* that the commission of the related predicate acts was defendants' regular way of doing business. (App. at 34a & n.20.)

> We share the Supreme Court's concern over the broad application of the civil RICO statute. We are nonetheless bound by the language of the statute and the Supreme Court's interpretation of it. Accordingly, it is for Congress to decide whether to narrow the scope of RICO; we are not in a position to do so by requiring that parties prove elements of a threat or of an injury, presented by predicate racketeering activity, beyond what is expressed in the language of the statute itself.

(App. at 38a.) (Citations and footnote omitted.)[6] Circuit Judge Becker, in his Honor's concurring opinion in this case, aptly explained why RICO plaintiffs who are alleging predicate acts of mail fraud are entitled to the same treatment as RICO plaintiffs who are alleging predicate acts of, for example, extortion, kidnapping or murder:

> Congress in the RICO statute specified an extensive laundry list of serious and arguably less serious acts that all constitute racketeering activity, and so it strikes me as improper to

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[6] *See also H.J. Inc.*, wherein this Court specifically held:

> There is no more room in RICO's "self-consciously expansive language and overall approach" for the imposition of an organized crime limitation than for the "amorphous 'racketeering injury' requirement" we rejected in *Sedima* [citation omitted]. We thus decline the invitation to invent a rule that RICO's pattern of racketeering concept requires an allegation and proof of an organized crime nexus.

492 U.S. at 249; *see also National Org. for Women, Inc. v. Scheidler*, 114 S. Ct. 798 (1994) (refusing to invent a rule that RICO requires that predicate acts be committed with economic motive).

> maintain that the statute's "pattern" requirement builds in a normative evaluation of the seriousness of the predicate acts. The concern about federalizing and attaching drastic penalties to "garden variety fraud," [citation omitted], is a legitimate one, but one that must be addressed by Congress rather than the courts. And Congress has told us what sorts of acts to worry about. Our concern with the pattern requirement is simply to insure that RICO liability is not attached to "isolated" or "sporadic" predicate acts. That task requires no inquiry into the seriousness of the acts. The "threat" for which we are looking is the threat of repeated prohibited conduct, not the threat of grievous harm.

(App. at 47a–48a.)

In sum, the Third Circuit's refusal to require proof of a "societal harm" separate and distinct from the societal harm that is inflicted by the commission of a series of related predicate acts over a substantial period of time is completely in accord with this Court's precedents. Time and again, the federal district courts and courts of appeals have attempted to limit the reach of civil RICO by establishing pleading and proof requirements nowhere contained in RICO itself. Time and again, this Court has struck down those attempts. Indeed, as noted by the court below (App. at 38a & 30a n.17), in *Sedima*, this Court struck down the Second Circuit's establishment of a requirement that there be a conviction on the predicate act and a requirement that there be proof of an amorphous "racketeering injury." 473 U.S. at 495. Four years later, in *H.J. Inc.*, this Court struck down the Eighth Circuit's establishment of a requirement that there be multiple schemes and a requirement that there be a nexus to organized crime.

492 U.S. at 250. Five years after that, in *National Organization for Women*, this Court struck down the Seventh Circuit's establishment of a requirement that there be proof that either the racketeering enterprise or the predicate acts be motivated by an economic purpose. 114 S. Ct. 806. In the case *sub judice*, the Third Circuit, sitting *in banc*, has refused to take the amorphous concept of "societal harm," whatever that may be, and make it a requirement under RICO. (App. at 30a n.17, 38a.) In so refusing, the Third Circuit has followed the clear instructions of this Court; there is no need to review that decision.

(b) Defendants also erroneously assert that the Third Circuit's *in banc* opinion on the issue of continuity conflicts with the law in the First, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits, as well as with other decisions in the Third Circuit. Contrary to the assertions in the petition for certiorari, there is no real or irreconcilable "conflict."

For example, defendants point to the decision by now-Justice Breyer in *Apparel Art Int'l, Inc. v. Jacobson*, 967 F.2d 720 (1st Cir. 1992), as representing a conflict between the First and Third Circuits on the issue of continuity. (Pet. at 11.) However, nothing contained in *Apparel Art* conflicts with the Third Circuit's *in banc* decision in this case. In *Apparel Art*, the First Circuit found a pattern of racketeering to be lacking in a case by a subcontractor against a contractor for conduct by the contractor in obtaining one Defense Department contract. 967 F.2d at 723-24. Importantly, the court there specifically found that the several instances of criminal behavior "*all took place over a comparatively short period of time*." *Id.* at 723 (emphasis added). The court also found that relatedness was missing. Noting that a pattern is not formed by "'sporadic activity,'" the court concluded "that the complaint does not allege the two or more separate acts that bear a

relationship, each to the others, either 'amount[ing] to,' or 'pos[ing] a threat of,' the kind of 'continued' criminal activity at which the RICO statute was aimed." *Id.* at 724 (quoting *H.J. Inc.*, 492 U.S. at 239) (brackets supplied by *Art Apparel* court). The First Circuit's analysis does not, as defendants suggest, stand in stark contrast to the analysis conducted by the Third Circuit in this case; the Third Circuit merely reached a different conclusion than did the *Apparel Art* court, based upon the facts and circumstances before it. *See* App. at 27a–37a; App. at 42a–45a (Becker, J., concurring). Importantly, in *Apparel Art*, the First Circuit cited with approval its earlier decision in *Fleet Credit Corp. v. Sion*, 893 F.2d 441 (1st Cir. 1990), a case which the dissent in this case concedes is supportive of the view that the commission of related predicate acts over a substantial period of time (in *Fleet*, four and one-half years) meets the pattern of racketeering requirement. *See* App. at 54a n.33 (Greenberg, J., dissenting). *Fleet Credit*, a case cited by plaintiffs in the district court and the court of appeals below, involved a single scheme devised and executed by a husband and wife in which they used two jewelry manufacturing companies to defraud plaintiff of approximately $7.5 million in loans. 893 F.2d at 442. In holding that plaintiff's complaint properly alleged a pattern of racketeering activity, the First Circuit stated:

> Here, Fleet alleges that 95 fraudulent mailings were sent over a four and one-half year period. Regardless of how we might have addressed this issue before *H.J.*, we believe this is the type of "long-term criminal conduct" defined by the *H.J.* court as constituting "continued criminal activity." The alleged criminal conduct spans years, not "a few weeks or months." Keeping in mind Congress's "natural and common sense approach to RICO's pattern

> element," *H.J.*, 109 S.Ct. at 2889, we hold that Fleet's allegations are sufficient to establish continuity.
>
> Had the number of acts alleged by Fleet been few or the period of time short, the predicate acts would not have amounted to continued criminal activity....Too few acts would suggest that the defendants were engaged in only "sporadic activity," *id.* 109 S.Ct. at 2900, and too short a period of time would suggest that defendants were not engaged in "long-term criminal conduct." *Id.* at 2902.

893 F.2d at 447 (footnote omitted). The facts in *Fleet Credit* are much closer to the facts in the instant case than are the facts in *Apparel Art*. The analysis employed by the First Circuit in *Fleet Credit* is essentially the same as that employed by the Third Circuit *in banc* in this case. Accordingly, there is no real conflict between the First and Third Circuits on the issue of continuity.

Likewise, there is no real conflict between the Fourth and Third Circuits. Defendants cite to the Fourth Circuit's decision in *Menasco, Inc. v. Wasserman*, 886 F.2d 681 (4th Cir. 1989), as conflicting with the Third Circuit's decision in this case. (Pet. at 12.) However, *Menasco* is distinguishable from the instant case because the unlawful activity only "took place over approximately one year." 886 F.2d at 684. More importantly, after deciding *Menasco*, the Fourth Circuit decided *Walk v. Baltimore & Ohio R.R.*, 890 F.2d 688 (4th Cir. 1989), a case which the dissent in this case also concedes is supportive of the view that the commission of related predicate acts over a substantial period of time (in *Walk*, ten years) meets the pattern of racketeering requirement. *See* App.

at 54a n.33 (Greenberg, J., dissenting). *Walk*, a case cited by plaintiffs in the district court and the court of appeals below, was on remand from this Court for reconsideration in light of *H.J. Inc.* On remand, the Fourth Circuit noted that its earlier analysis "saw in the many alleged predicate acts of mail and wire fraud only a single 'scheme, limited in scope to the accomplishment of a single discrete objective -- forcing out the minority in a single corporate structure.'" 890 F.2d at 689 (quoting from its earlier opinion, 847 F.2d at 1105). The Fourth Circuit went on to find that, in light of this Court's decision in *H.J. Inc.*, "our analysis ... probably gave too little weight to the sheer duration of the predicate acts alleged, and too much to their closed-ended character." 890 F.2d at 689. The Fourth Circuit stated:

> Whether analyzing "closed-ended" or "open-ended" conduct, our approach has been designed to determine on a case-by-case basis whether the "scope and persistence" of predicate acts was such as to demonstrate that they constituted, or sufficiently threatened, "long-term criminal conduct," so as to bring them within Congress' expressed concern with that sort of conduct rather than merely episodic criminal activity.
>
> * * *
>
> [W]e conclude that activity continuing, as here alleged, for a period of ten years, must be considered to have "extended over a substantial period of time," hence to constitute long-term conduct meeting the pattern requirement, notwithstanding the "closed-ended" nature of the conduct.

Id. at 690; *see also Morley v. Cohen*, 888 F.2d 1006 (4th Cir. 1989) (where predicate acts of racketeering were mail and wire

fraud, a scheme to defraud investors of five years duration was sufficient to establish a pattern of racketeering activity). There obviously is no real conflict between the Fourth and Third Circuits on the issue of continuity.

Nor is there a conflict between the law of the Sixth and Third Circuits. Defendants cite to District Judge Aldrich's decision on behalf of the panel in *Vemco, Inc. v. Camardella*, 23 F.3d 129 (6th Cir.), *cert. denied*, 115 S. Ct. 579 (1994), as conflicting with the Third Circuit's *in banc* decision in this case. (Pet. at 12 n.2.) *Vemco* is easily reconciled with this case; the *Vemco* court disregarded certain events as not qualifying as predicate acts under RICO, thus reducing the duration of the alleged scheme from more than four years to just seventeen months. 23 F.3d at 134. Importantly, nothing contained in *Vemco* distinguishes or otherwise casts doubt upon the continued validity of the Sixth Circuit's prior decision in *Dana Corp. v. Blue Cross & Blue Shield Mutual of N. Ohio*, 900 F.2d 882 (6th Cir. 1990). *Dana* was cited by plaintiffs in the district court and the court of appeals below, and was also conceded by the dissent below as supportive of the view that the commission of related predicate acts over a substantial period of time (in *Dana*, seventeen years) meets the pattern of racketeering requirement. *See* App. at 54a n.33 (Greenberg, J., dissenting). In *Dana*, noting that defendants cannot "'insulate [themselves] from the reach of RICO simply by repeatedly bilking the same victim[,]'" the Sixth Circuit concluded that "the allegations of fraud occurring for a period of seventeen years, along with the specific mailings evidencing such a scheme, are sufficient to state a claim of a pattern of racketeering activity." 900 F.2d at 886–87 (quoting *Blue Cross & Blue Shield of Michigan v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989)). There obviously is no real conflict between the Sixth and Third Circuits on the issue of continuity.

In urging the existence of a conflict between the Fifth and Third Circuits, defendants direct this Court to *In re Burzynski*, 989 F.2d 733 (5th Cir. 1993). (Pet. at 12 n.2.) *Burzynski* simply held that fraudulent acts committed during the course of and solely pertaining to litigation regarding the denial of insurance claims did not amount to or threaten continuing racketeering activity. Thus, *Burzynski* can be reconciled with the Third Circuit's opinion in this case. In addition, *Abell v. Potomac Ins. Co. of Ill.*, 946 F.2d 1160 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1944 (1992), a case cited by defendants in connection with their constitutional argument (Pet. at 19 n.9), the Fifth Circuit found continuity where a defendant committed a series of related mail fraud predicates over a period of more than six years, in connection with a bond offer, resulting in a multi-million dollar loss to some 500 bondholders. 946 F.2d at 1168. The Fifth Circuit rejected defendant's argument that plaintiffs "were only able to show that [defendant] engaged in isolated and sporadic criminal acts related to the ... bond offer." *Id.* & n.23. *Burzynski* did nothing to change the continuity analysis used by the Fifth Circuit in *Abell*; there is no irreconcilable conflict between the Fifth and Third Circuits on the issue of continuity.

Likewise, there is no irreconcilable conflict between the Ninth and Third Circuits. Defendants cite *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992), as conflicting with the Third Circuit's *in banc* decision in this case. (Pet. at 12 n.2.) Defendants have again manufactured a conflict where none exists. In *Sever*, a RICO action based upon an alleged wrongful termination of employment, the Ninth Circuit found both relatedness and continuity to be lacking. 978 F.2d at 1535. The alleged predicate acts were committed over a period of less than one year. *Id.* at 1532-33. Further, there was no suggestion that the unlawful conduct was defendants' regular way of doing business such that there existed a threat

of continued criminal activity. *Id.* at 1535. Significantly, other decisions in the Ninth Circuit have found the existence of a pattern of racketeering when plaintiffs have shown, as plaintiffs showed here, that the unlawful conduct was a defendant's regular way of doing business. *See, e.g., Ticor Title Ins. Co. v. Florida*, 937 F.2d 447, 450 (9th Cir. 1991) (partners in real estate investment business who forged three federal tax lien releases within a thirteen month period satisfied the continuity prong of the pattern test since the "frequency of the forgeries suggests that this practice had become a regular way of conducting business..."); *cf. Ikuno v. Yip*, 912 F.2d 306, 309 (9th Cir. 1990) (attorney's actions in filing of two allegedly false annual reports "carried with them the threat of continuity [since he] was filing annual reports and there is no evidence that he would have stopped doing so if KLCL had not ceased to do business."). Given that *Sever* can be reconciled with the Third Circuit's decision in this case, and given the Ninth Circuit's decisions in these other cases, there is no irreconcilable conflict between the Ninth and Third Circuits on the issue of continuity.

Further, there is no conflict between the "multiple factor tests" employed the Seventh, Tenth, and District of Columbia Circuits and the analysis conducted by the Third Circuit *in banc* in this case. (Pet. at 13.) Indeed, defendants themselves concede that the multiple factor tests employed by these circuits is comparable to that which the Third Circuit applied in *Barticheck v. Fidelity Union Bank*, 832 F.2d 36 (3d Cir. 1987). (Pet. at 13.) Contrary to defendants' assertion that the Third Circuit "has now virtually abandoned" *Barticheck*, (Pet. at 13), the Third Circuit carefully considered and specifically declined to overrule *Barticheck*, stating:

> The fact that we do not employ the *Barticheck* factors in our analysis here does not, however,

> mean that they might not be relevant in a different case in determining if continuity exists. As the Court noted in *H.J. Inc.*, in those cases where relatedness and continuity are in doubt, other factors should be examined to discern if there is a "pattern of racketeering activity" under RICO[.]

(App. at 36a.) The Third Circuit's finding that, under the facts and circumstances of this case, relatedness and continuity are not in doubt, and hence an analysis of the other *Barticheck* factors is unnecessary, does *not* mean that the Third Circuit's decision conflicts with the decisions of others circuits that used factors similar to those enumerated in *Barticheck* to determine whether, in the facts and circumstances of those cases, relatedness and continuity were present.

It should not go unnoted by this Court that defendants argue how the Third Circuit's *in banc* decision in this case wrongly departs from that court's panel decisions in other cases, such as *Barticheck*, *Marshall-Silver Constr. Co. v. Mendel*, 894 F.2d 593 (3d Cir. 1990), and *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406 (3d Cir.), *cert. denied*, 501 U.S. 1222 (1991). There is nothing irreconcilable about the Third Circuit's *in banc* decision in this case and its panel decisions in other cases. In fact, to the extent one of the panel decisions could be read as conflicting with the *in banc* opinion, that panel decision was overruled. *See* App. at 30a n.17 (overruling *Marshall-Silver* to the extent that it can be read to require "the existence of a 'societal threat,' whatever

exactly that may be, beyond the commission of the criminal predicate acts.").[7]

The Third Circuit's *in banc* decision in this case simply does not, as defendants argue, represent a sharp departure from

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[7]This Court should also note that the author of the dissenting opinion in the instant case, Circuit Judge Greenberg, also authored two opinions under criminal RICO wherein continuity was found to exist based upon the sheer duration of the commission of the predicate acts. *See United States v. Pellulo*, 964 F.2d 193, 210 (3d Cir. 1992) ("In our view, 19 months is sufficiently longer than 'a few weeks or months' and indicates the type of long-term criminal conduct Congress sought to eradicate in enacting RICO.); *United States v. Woods*, 915 F.2d 854, 863 (3d Cir. 1990) ("Woods' conduct also easily satisfies the continuity requirement of *H.J. Inc.* The four years over which these related racketeering acts were committed constitutes a substantial period of time. Accordingly ... a pattern of racketeering activity obviously existed...."), *cert. denied*, 499 U.S. 947 (1991). Judge Greenberg apparently would hold that duration alone can satisfy the continuity prong of RICO's pattern in criminal cases but not civil cases; indeed, in his dissent in this case, Judge Greenberg attempted to distinguish his opinion in *Pellulo* on the ground, *inter alia*, that the unlawful activity in *Pellulo* "had a different ring to it...." (App. at 67a, Greenberg, J., dissenting.) This distinction reveals nothing more than Judge Greenberg's dislike (seemingly shared by many federal judges) for the application of RICO in civil cases wherein the predicate offenses are mail or wire fraud. However, it was Congress' prerogative to include mail and wire fraud as predicate offenses under RICO and the fact that mail fraud in a civil case has "a different ring to it" than does, for example, bribery, in a criminal case, cannot be a sufficient basis upon which to hold that predicate acts of mail fraud committed over a substantial period of time cannot, without more, satisfy continuity, but that predicate acts of bribery committed over a substantial period of time do, without more, satisfy continuity. *Cf.* App. at 47a-48a (Becker, J. concurring).

the existing body of RICO jurisprudence.[8] Moreover, defendants' first Question Presented simply is not raised in the decision below. Accordingly, the petition for a writ of certiorari to review that question should be denied.

2. The Third Circuit's *in banc* decision in this case on the issue of mail fraud does not conflict with the decisions of the other Courts of Appeals, and defendants' request for an opportunity to attempt to "amend" RICO by judicial legislation should be denied.

(a) Defendants assert that the Third Circuit's *in banc* decision conflicts with the decisions of the First and Seventh Circuit on the issue of mail fraud. (Pet. at 15–19.) This erroneous assertion, made in the text of the petition, is the apparent basis for defendants' second and third Questions Presented. Defendants create a conflict between the First and Third Circuits, and between the Seventh and Third Circuits, where none exists. Contrary to the petition for certiorari, the Third Circuit *did* consider the "underlying fraud's duration, scope, character and relation to the mailings" (second Question Presented) before concluding that defendants had committed forty–one related acts of mail fraud. *See* App. at 9a–14a (analysis of Price Waterhouse's two financial reports), 10a ("Price Waterhouse concluded that 'the books and records of Tabas Enterprises do not reflect the equal distribution of income,' and that 'indications of fraud exist.'") ("The Price Waterhouse reports revealed a continuing series of transactions

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[8]It is noteworthy that the court below does not reject or criticize the approach to the continuity question taken by any other circuit. This underscores the fact that there is no real conflict between the Third Circuit and any other circuit.

to divert Tabas Enterprises' income for the personal use of Daniel and his family, through direct monetary benefits as well as other types of benefits."), 21a–23a (analysis of mail fraud statute), 30a–33a & n.18 (examination of the underlying scheme to defraud, and finding that "the mailings were incident to an essential part of the scheme"), 35a (court "focus[es] on the mail fraud element of the underlying fraudulent activity as well as on the element of the mailings" and concludes that "the evidence here meets the standard for open-ended continuity."). Thus, the opinion below does not raise defendants' second Question Presented.

(b) Further, plaintiffs submit that there is only one correct answer to defendants' third Question Presented which, as noted above, was provided by the Third Circuit. *See* App. at 22a n.15 (answering in the affirmative the dissent's query as to "whether Congress intended RICO to be applied to a defendant, participating in a scheme to defraud, who mails substantial payments but not to a similar defendant who delivers the payments by hand ... because, first, the former example constitutes mail fraud and the latter does not and, second, Congress has chosen to include mail fraud as a RICO predicate act."). Thus, there is no need to review defendants' third Question Presented.

(c) Defendants' second and third Questions Presented are aimed at attempting a judicial "amendment" to the civil RICO statute for cases where the underlying predicate acts are mail or wire fraud. *See* Pet. at 16–17.[9] This Court,

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[9]Defendants repeatedly state that the mailings at issue were "innocent mailings." There is no support in the record for that assertion, and the Third Circuit made no such finding. (App. at 32a n.18 ("mailings were incident to an essential part of the scheme").)

(continued...)

however, has repeatedly and correctly stated that the decision of whether to amend RICO rests with Congress. In *Sedima*, this Court stated:

> It is true that private civil actions under the statute are being brought almost solely against [respected and legitimate] defendants, rather than against the archetypal, intimidating mobster. Yet this defect -- if defect it is -- is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications.
>
> We nonetheless recognize that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors. Though sharing the doubts of the Court of Appeals about this increasing divergence, we cannot agree with either its diagnosis or its remedy. The "extraordinary" uses to which civil RICO has been put appear to be primarily the result of the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud, and the failure of Congress and the courts to develop a meaningful concept of "pattern." We do not believe that the amorphous standing

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[9](...continued)
However, even if the mailings were innocent, no different result would obtain. (App. at 31a n.18 (completely innocent mailings can satisfy the mailing element of the mail fraud statute).)

> requirement imposed by the Second Circuit effectively responds to these problems, or that it is a form of statutory amendment appropriately undertaken by the courts.

Sedima, 473 U.S. at 499–500 (footnote omitted).

This sentiment was reiterated in *H.J. Inc.*, wherein this Court stated:

> If plaintiffs' ability to use RICO against businesses engaged in a pattern of criminal acts is a defect ... it is one "inherent in the statute as written," and hence beyond our power to correct. *RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court.*

492 U.S. at 249 (emphasis added).[10]

Significantly, a majority of Congress has *not* been inclined to rewrite RICO. Indeed, since this Court's decision in *Sedima*, there have been numerous unsuccessful attempts at amending RICO. *See* S. 1521, 99th Congress, 1st Session (1985); H.R. 5445, 99th Congress, 2d Session (1986); S. 2907,

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[10]The Third Circuit in this case has likewise left the task of changing RICO to Congress. *See* App. at 38a ("it is for Congress to decide whether to narrow the scope of RICO"); *see also* App. at 47a ("The concern about federalizing and attaching drastic penalties to 'garden variety fraud' ... is a legitimate one, but one that must be addressed by Congress rather than the courts.") & 49a ("While I share Judge Roth's uneasiness as to where this leaves the law, I can only hope its eloquent and clarion call will not be ignored by Congress.") (Becker, J., concurring).

99th Congress, 2d Session (1986); S. 1523, 100th Congress, 1st Session (1987); H.R. 1046, 101st Congress, 1st Session (1989); S. 438, 101st Congress, 2d Session (1990); H.R. 5111, 101st Congress, 2d Session (1990); H.R. 1717, 102d Congress, 1st Session (1991).[11] Moreover, many of the proposed changes to RICO involve precisely the type of judicial amendment sought by defendants herein. For example, H.R. 5111, 101st Congress, 2d Session (1990), proposed, *inter alia*, the following amendments to RICO: i) a codification of the definition of "pattern of racketeering" set forth in *H.J. Inc.*,[12] but with an exception thereto which would eliminate the availability of RICO in cases where there was one act of fraud carried out by a series of phone calls or letters; ii) a provision which would limit private civil actions to cases "where its use clearly serves the public interest and provides appropriate deterrence against the repetition of egregious criminal conduct"; and, iii) a judicial "gatekeeper" provision that would

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[11]Of these, only H.R. 5445, 99th Congress, 2d Session (1986) passed the House of Representatives, October 7, 1986. *See* Congressional Record, Vol. 132-Part 20, pp. 29297, 29309. "On October 17, 1986, Senators Metzenbaum and Bumpers attempted to add the House-passed bill to an appropriations bill. That attempt was tabled by the Senate by a vote of 47-44." S. REP. NO. 269, 101st Cong., 2d Sess., pt. 2, at 4 (1990) (emphasis added) (Comm. on the Judiciary).

[12]Significantly, in explaining how continuity can be established under *H.J. Inc.*, the House Committee on the Judiciary reported as follows: "Under [*H.J. Inc.*], the requisite continuity can be established in any of several factors, including, but not limited to, specific evidence of a threat of continuing racketeering activity, *the duration of the racketeering activity over a substantial period of time, or* the relationship of the racketeering acts to a long-lasting criminal enterprise." H.R. REP. NO. 975, 101st Cong., 2d Sess., at 10 (1990) (emphasis added) (Comm. on the Judiciary).

require district courts to dismiss cases that do not meet a host of stringent requirements including those set forth above. *See* H.R. 5111; H.R. REP. NO. 975, 101st Cong., 2d Sess., at 8–15 (1990). Other bills, such as S.438, 101st Congress, 2d Session (1990), proposed amend–ments to RICO such as the detrebling for most private (and some governmental) litigants, and the continuation of treble damages for private litigants only if the defendant was convicted of a criminal violation upon which the civil suit is based. All of these and many other legislative changes were proposed to correct the so–called "defect" that certain members of Congress (at the urging of the judiciary) have perceived to be present in RICO as currently enacted. However, given the repeated, but rejected, congressional attempts to amend RICO, following many hearings and much debate, there can be no doubt that Congress has decided to keep RICO purposefully broad, and has rejected precisely the changes sought by defendants herein. Inasmuch as defendants' second and third Question Presented suggest a form of statutory amendment that Congress has considered but not enacted, review thereof should be denied.

3. This Court should not review the constitutionality of the civil RICO statute in this case.

Like many before them, defendants here seize upon Justice Scalia's concurring opinion in *H.J. Inc.*, and question the constitutionality of the civil RICO statute. (Pet. at 17–18, quoting *H.J. Inc.*, 492 U.S. at 255–56 (Scalia, J., concurring).) Defendants here, however, never raised the question of RICO's constitutionality in the district court, in the court of appeals in the first instance, or in the court of appeals upon rehearing *in banc*. There is absolutely no reason for the Court to consider that question, *i.e.*, defendants' fourth Question Presented, raised

for the first time in this Court.[13] *Compare National Org. for Women, Inc. v. Schiedler*, 114 S. Ct. 798, 806 n.6 (1994) ("None of the respondents made a constitutional argument as to the proper construction of RICO in the Court of Appeals, and their constitutional argument here is directed almost entirely to the nature of their activities, rather than to the construction of RICO. We therefore decline to address the First Amendment question argued by respondents and the amici.").

Even if this Court were to excuse defendants' failure to raise the constitutional question at any stage of the proceedings below, the question is still not properly before this Court because defendants do not (and cannot) contend that the underlying mail fraud statute, defendants' violations of which constitute the underlying predicate acts, is also unconstitutional. As this Court plainly stated in a case

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[13]It is ironic that defendants would cite to *Fretag v. Commissioner*, 501 U.S. 868 (1991), to support their contention that the constitutionality of RICO should be considered by this Court even though neither court below has been asked to pass on it. (Pet. at 19 n.8.) As noted above, in raising the constitutional question in this Court, defendants are obviously attempting to appeal to Justice Scalia who posited the constitutional question in his Honor's concurring opinion in *H.J. Inc.*, as well as to the Chief Justice, and Justices O'Connor and Kennedy, each of whom joined in Justice Scalia's concurrence therein. However, in *Fretag*, it was Justice Scalia, joined by Justices O'Connor, Kennedy and Souter, who would have declined to entertain the constitutional challenge therein presented because that challenge had not been raised and considered in the court below. 501 U.S. at 892–95 (Scalia, J. concurring in part and concurring in the judgment).

wherein the Court was called upon to pass on the constitutionality of Indiana's RICO statute:

> We find no merit in petitioner's claim that the Indiana RICO law is unconstitutionally vague as applied to obscenity predicate offenses. Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either.

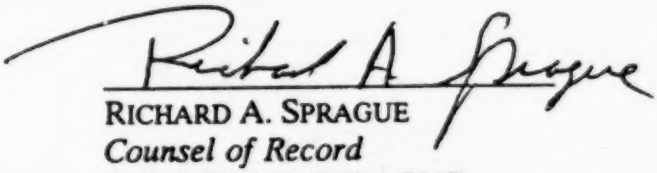
Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 58 (1989). Here, the federal RICO statute totally encompasses the federal mail fraud statute. "[I]f the latter is not unconstitutionally vague, the former cannot be vague either." *Id.*

Finally, every court of appeals called upon to consider the question has upheld the constitutionality of RICO. *See* Pet. at 19 & n.9. Accordingly, defendants' fourth Question Presented should be denied review.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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Dated: May 10, 1995
Philadelphia, Pennsylvania

RESPONDENTS' APPENDIX

Filed February 23, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-1495; 92-1529

HARRIETTE S. TABAS; RICHARD S. TABAS;
NANCY C. TABAS; GERALD LEVINSON,
as Executors of the Estate of CHARLES L. TABAS
Appellants

v.

DANIEL M. TABAS; JOSEPH P. CAMPBELL;
JAMES J. MCSWIGGAN; LEE A. TABAS;
ROBERT TABAS; SUSAN TABAS TEPPER;
LINDA TABAS STEMPEL; JOANNE TABAS WURZAK;
CAROL TABAS STOFMAN; HOWARD WURZAK

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-01355)

Argued: January 26, 1993

Before: GREENBERG, ROTH and LEWIS
Circuit Judges

Reargued In Banc October 18, 1995

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, LEWIS, ROTH and MCKEE, *Circuit Judges*

ORDER AMENDING OPINION

Judge Becker's concurring opinion in the above-captioned case filed February 13, 1995, is amended as follows:

(1) On page 35, lines 3 to 5, the first sentence should be amended to read "I join in all of Judge Roth's lead opinion except Part IV.D, and I concur in the judgment."

(2) On page 38, line 14, remove the quotation mark before "a combination".

(3) On page 40, line 7, delete "Majority" and insert "Lead".

(4) On page 42, line 6, delete "the majority" and insert "Judge Roth".

/s/ Edward R. Becker
Circuit Judge

DATED: February 23, 1995

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for the Third Circuit

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March 1, 1995

West Publishing Company
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St. Paul, MN 55164-0526

Re: TABAS V. TABAS
Nos. 92-1495 & 92-1529

Dear Publisher:

The Court has directed me to advise you of corrections which should be made in the published slip opinion which was filed on February 13, 1995, in the above-entitled cases:

On page 14, line 1, delete the first full sentence beginning with "The district court's". (This sentence was inadvertently duplicated.)

On page 26, between line 15 and 16, I have inserted a "B."

On page 30, at the top of the page, I have inserted a "C."

On page 31, between lines 7 and 8, I have inserted a "D."

On page 32, between lines 8 and 9, I have inserted an "E."

Very truly yours,
P. Douglas Sisk, CLERK

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Honorable Stewart Dalzell

Filed March 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-1495; 92-1529

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ORDER AMENDING OPINION

Judge Alito's concurring opinion in the above captioned case filed February 13, 1995, is amended as follows:

The first sentence of that opinion ("I concur in the judgment, and I join parts I, II, VI and VI of the opinion of the court.") is deleted. In its place, the following is inserted:

I concur in the judgment, and I join those parts of Judge Roth's opinion that constitute an opinion of the in banc court, i.e., parts I, II, V, and VI. I do not join part IV of Judge Roth's opinion.

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: March 7, 1995

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for the Third Circuit

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-1495; 92-1529

HARRIETTE S. TABAS; RICHARD S. TABAS;
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Circuit Judges

Reargued In Banc October 18, 1994

Before: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, LEWIS, ROTH and MCKEE, Circuit Judges

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ORDER AMENDING OPINION

Judge Becker's concurring opinion in the above captioned case filed February 13, 1995, is amended as follows:

(1) On page 35, lines 3 to 5, the first sentence should be amended to read "I join in all of Judge Roth's lead opinion, except Parts III and IV.D, and I concur in the judgment."

/s/ Edward R. Becker
Circuit Judge

DATED: May 2, 1995